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IN THE

Supreme Court of the United States

October Term, 1967.
No. 323

RAMONA BENNETT and MOIRA C. MORSE,
Petitioners,

vs.

PEOPLE OF THE STATE OF CALIFORNIA,
Respondent.

Petition for Writ of Certiorari to the Supreme Court of the State of California.

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PEOPLE OF THE STATE OF CALIFORNIA,

Respondent.

Petition for Writ of Certiorari to the Supreme Court of the State of California.

To the Honorable Chief Justice and the Associate Justices of the Supreme Court of the United States:

Petitioners pray that a writ of certiorari issue to review the judgment of the Supreme Court of the State of California denying a petition for writ of habeas corpus, entered in the above-entitled case on April 12, 1967.

Opinions Below.

There are no written opinions by the state courts below.

The orders of the Court below denying the petitions for writs of habeas corpus are set forth hereinafter as Appendix "A".

Jurisdiction.

1. The judgment of the California Supreme Court was made and entered on April 2, 1967.

2. No rehearing was sought in the court below and no extension sought in this Court within which to petition for certiorari.

3. The statutory provisions believed to confer jurisdiction on this Court to review the judgment in question by writ of certiorari are 28 U.S.C. 1257(3) and Rule 22(3) of the Rules of the United States Supreme Court.

Questions Presented.

1. Section 647, subsection (a) as construed and applied to proscribe expressions protected under the First Amendment is unconstitutionally vague and indefinite.

2. Only obscenity is proscribed under the First Amendment, therefore, the trial court denied petitioners due process and equal protection of the law in failing to instruct the jury on the test for obscenity.

Constitutional Provisions Involved.

The First Amendment to the United States Constitution provides in pertinent part:

> ". . . shall make no law . . . abridging the freedom of speech, . . ."

The Fourteenth Amendment to the United States Constitution provides in pertinent part:

> ". . . nor shall any State deprive any person of life, liberty or property without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

Statutes Involved.

Section 647, subsection (a) of the California Penal Code provides that (first part):

> "(a) Who solicits anyone to engage in or who engages in lewd or dissolute conduct in any public place or in any place open to the public or exposed to public view."

Statement of the Case.

Petitioners were employed as entertainers, to wit, bare breasted or "topless" female dancers at various beer taverns in the County of Los Angeles, State of California. Petitioners were arrested and charged with performing an allegedly lewd and dissolute act in a public place in violation of Section 647, subsection (a) of the California Penal Code[1] while performing ordinary "go-go" or "rock 'n roll" type dances on a stage, attired in bikini type briefs with their breasts exposed, in the course of their employment.

The charges were brought to trial in the Municipal Court of the State of California, County of Los Angeles. In each case the arresting police officer testified that in his opinion the dance of the respective petitioner involved a back and forth motion which to him simulated sexual intercourse.

Before the matters were submitted to the jury in each case, petitioners orally requested that the trial court instruct the jury as to the definition and applicability of the test for obscenity as set forth in Section 311 of the California Penal Code,[2] or by the United

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[1]Section 647, subsection (a) California Penal Code is set forth in full in Appendix "B" attached hereto.

[2]Section 311 California Penal Code is set forth in full Appendix "C" attached hereto.

States Supreme Court in *Roth v. United States,* 354 U.S. 476, or related cases. The trial court in each case denied the request and ruled in effect that these tests for obscenity were not applicable to a violation of Section 647, subsection (a), Penal Code.

Petitioners were each found guilty by the jury and convicted of violation Section 647, subsection (a), California Penal Code. A probation and sentence hearing has been scheduled in each case for May 22, 1967, in the Municipal Court of the State of California, County of Los Angeles. If these convictions are permitted to stand, each petitioner will be compelled to register as a sex offender pursuant to Section 290, California Penal Code.[3]

How the Federal Question Was Raised.

A. In the Trial Court.

Each petitioner orally requested an instruction to the jury as to the definition and applicability of the test for obscenity as set forth in Section 311, California Penal Code or by the United States Supreme Court.[4] Each request was denied. No instructions embracing the issue of obscenity were given to the jury.

B. In the Court Below.

On March 24, 1967, each petitioner filed a separate petition for writ of habeas corpus specifying, *inter alia,* that the conviction and restraint of each petitioner was illegal because of the following:

"(f) The trial court refused to instruct the jury that in order to find the petitioner in violation of

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[3]Section 290 California Penal Code is set forth in full in Appendix "D" attached hereto.

[4]The proceedings in the trial court have not yet been transcribed due to the narrow issues presented herein, petitioners are filing as Appendix E. a Certified Record which includes, *inter alia,* a partial settled statement of the trial court proceedings.

Section 647, subsection (a), Penal Code, they must find that the allegedly lewd dance was obscene as defined by Section 311, Penal Code, or by the standards set forth by the United States Supreme Court.

"(g) That petitioner was denied equal protection of the law under the Fourteenth Amendment to the United States Constitution and Article I, Section 311 of the California Constitution in that she was illegally charged with violation of Section 647, subsection (a) Penal Code, an offense which requires upon conviction, registration as a sex offender under Section 290, Penal Code and not afforded the protection of the First Amendment to her form of expression.

"(h) That Section 647, subsection (a), Penal Code, as interpreted by the trial court is unconstitutionally vague and ambiguous and in violation of the Fourteenth Amendment to the United States Constitution.

"(i) That Section 647, subsection (a), Penal Code as applied by the trial court to a form of expression protected under the First Amendment is vague and ambiguous and violates the due process and equal protection under the Fourteenth Amendment to the United States Constitution."

These grounds for attacking the judgment of conviction by writ of habeas corpus were before the California Supreme Court which denied each petition. Attack by writ of habeas corpus of a judgment of conviction obtained in violation of fundamental constitutional rights has been held to be a proper procedure in California.

In re James, 38 Cal. 2d 302;
In re Winchester, 53 Cal. 2d 358;
In re Cregler, 56 Cal. 2d 308.

REASONS FOR GRANTING THE WRIT AND ARGUMENTS AMPLIFYING THE SAME.

I.

Entertainment and Dancing Are Forms of Expression Protectible Under the First Amendment.

It is settled that the constitutional protection of freedom of expression includes not only the exposition of ideas, but entertainment and amusement as well.

Winters v. New York, 333 U.S. 507 (1947);

Weaver v. Jordan, 64 Cal. 2d 235, 49 Cal. Rptr. 537 (1966).

It was stated in *Winters,* that:

> "The line between the informing and the entertaining is too elusive for the protection of that basic right. Everyone is familiar with instances of propaganda through fiction. What is one man's amusement, teaches another's doctrine. Though we can see nothing of any possible value to society in these magazines, they are as much entitled to the protection of free speech as the best literature."
>
> *Winters v. New York, supra,* 333 U.S. 507, 510.

Citing *Winters,* the California Supreme Court recently expressed that:

> "Also encompassed (within the right of freedom of speech and press) are amusement and entertainment."
>
> *Weaver v. Jordan, supra,* 64 Cal. 2d 235, 242.

In *Adams Newark Theater Co. v. City of Newark,* 120 A. 2d 496, burlesque shows were held to fall within the purview of First Amendment protections.

The form of expression involved here are dances performed by the petitioners as entertainers in beer taverns. They performed ordinary "rock 'n roll" or "go-go" type dances to the accompaniment of juke box music while attired in bikini type briefs with their breasts exposed. Based on the foregoing authorities, it clearly appears that this form of expression comes within the protection of the First Amendment. Moreover, there has been a tendency for local ordinances to define the use of "topless" barmaids and dancers as entertainment.

People v. Kukkanen, 248 A.C.A. 450 (1967);
Robins v. County of Los Angeles, 248 A.C.A. 611 (1967).

II.

Section 647, Subsection (a) as Construed and Applied to Proscribe Expressions Protected Under the First Amendment Is Unconstitutionally Vague and Indefinite.

The requirement that a statute be clear and definite is based upon two fundamental considerations:

(1) Statutes, guide courts and administrative tribunals in the adjudication of various rights, duties and liabilities and provide adequate standards for enforcing the legislative mandate uniformly and consistently in accordance with legislative intent.

United States v. Petrillo, 332 U.S. 1, 7;
Minnesota v. Probate Court, 303 U.S. 270;
Mahler v. Eby, 264 U.S. 32, 40-41.

(2) In addition to serving as a guide for adjudication, all statutes must give guidance to individuals with respect to their future conduct.

It is with respect to this function of statutes that the void-for-vagueness principle had its origin and with which it has been most often concerned.

United States v. Harris, 347 U.S. 612.

California courts have similarly applied these principles.

In re Newbern, 53 Cal. 2d 786, 797;

In re Davis, 242 A.C.A. 760, 767.

In 1961, the California Legislature repealed Section 647, subdivision (5), Penal Code and enacted in its place Section 647, subsection (a), Penal Code (stats. 1961, Ch. 560). Although the complexion of the statute was changed, the words "lewd and dissolute" were retained. Judicial interpretations of these words indicate their diverse and varied applications.

An attempt was made to define these terms in *People v. Babb,* 103 Cal. App. 2d 326, 330:

> " 'Lewd' and 'dissolute' are terms often used interchangeably. Each applies to the unlawful indulgence in lust. Whether in public or private. (*In re McCue* 7 C.A. 765, 766 (96 P. 110).) 'Lewd' is defined to mean: '4. Lustful; libidinous; lascivious; unchaste.' 'Dissolute' is defined to mean: '2. . . . loose in morals and conduct; wanton; lewd; debauched.' Webster's New Inter. Dict., 2d Ed.
>
> ". . . It is true that a person can be lewd and dissolute without committing the infamous crime against nature . . ."

These definitions seem to suffer the same constitutional infirmity as the phrase "outraging public decency" contained in Section 650½, California Penal Code which was recently held unconstitutionally vague.

In re Davis, supra, 242 A.C.A. 760.

A person who violates Section 11721 Health and Safety Code (narcotic addict) has been held to be a dissolute person under Section 647, subdivision 5, Penal Code.

People v. Jaurequi, 142 Cal. App. 2d 555, 298 P. 2d 896.

These terms have also been applied to a sodomist.

People v. Babb, supra, 103 Cal. App. 2d 326 and to a window peeper;

People v. Allington, 103 Cal. App. 2d 911, 229 P. 2d 495.

The words "lewd and dissolute" are also found in the following sections of the California Penal Code referring to various acts of sex perversion: 647(a); 288-288.1; 290; 314; 286; 288(a); 272 and 644.

Past applications of "lewd and dissolute" span from the most degenerate crimes against nature to a narcotics addict. However, there is no indication that these terms as used in Section 647, subsection (a), (or its parent Section 647, subdivision 5) were ever intended to be applicable to an expression protected by the First Amendment. Moreover, the use of "lewd" and "dissolute" in other sections of the Penal Code indicate a connection with sex perversion.

When the California Legislature repealed Section 647, subdivision 5 and enacted Section 647, subsection (a), it also enacted Section 311 Penal Code *et seq.* defining obscenity. This was passed in the shadow of *Roth v. United States,* 354 U.S. 476 and *Alberts v. California,* 355 U.S. 852.

The Legislature was fully cognizant of the permissible limits of free expression as set forth in *Roth-*

Alberts, and therefore was careful only to proscribe "obscenity" in accordance with the *Roth-Alberts* guidelines. *Zeitlin v. Arnebergh,* 59 Cal. 2d 901, 911-912; 31 Cal. Rptr. 800, 811-812. It is inconceivable that a legislature that sought so carefully to act in accordance with the pronouncements of the United States Supreme Court to protect First Amendment rights would with the same sweep of its lawmaking hand ignore these rights altogether in enacting Section 647, subsection (a). Legislative silence in Section 647, subsection (a) and the legislative history of Section 311 compel a single conclusion—Section 647, subsection (a) was not intneded to apply to expressions protected by the First Amendment. Petitioners have been tried under this statute for a First Amendment expression merely because the vague and indefinite language of the statute permits such a construction.

As a guide to adjudication Section 647, subsection (a) surely fails. Its vague and indefinite language permits an interpretation that punishes expressions protected by the First Amendment. If this statute applies to so called "topless" entertainment, it equally may apply to entertainment in the form of a lecturer advocating free love, abortion laws or explaining human sexual behavior, poetry reading, or stage shows in general. Failing as a guide to adjudication, it can scarcely serve as a guide to future conduct, viz., any person who entertains or speaks on subject related to sex may unconsciously step within the area of "lewd and dissolute" conduct and thus be exposed to the requirement of registration as a sex offender—a punishment generally reserved for the most vile sex deviates.

It has also been held that the void-for-vagueness doctrine applies to a statute which is so broad and sweeping that it prohibits conduct protected by the United States Constitution.[5]

See: *Stromberg v. California,* 283 U.S. 359;
Herndon v. Lowrey, 301 U.S. 242;
Winters v. New York, 333 U.S. 507.

In *Winters v. New York,* 333 U.S. 507, 509-510, the United States Supreme Court held that:

> "It is settled that a statute so vague and indefinite, in form *and as interpreted,* as to permit within the scope of its language the punishment of incidents fairly within the protection of the guarantees of free speech is void, on its face as contrary to the Fourteenth Amendment. *Stromberg v. California,* 283 U.S. 359, 369; *Herndon v. Lowrey,* 301 U.S 242, 258. A failure of a statute limiting freedom of expression to give fair notice of what acts will be punished and such a statute's inclusion of prohibitions against expressions, protected by the principles of the First Amendment, violates an accused's rights under procedural due process and freedom of speech or press." (Emphasis added)

The Court further expressed on page 517 that:

> "This court goes far to uphold state statutes that deal with offenses difficult to define, *when they are not entwined with limitations on free expression.*" (Emphasis added)

Also see *Stromberg v. California,* 283 U.S. 359.

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[5]Collings, Unconstitutional Uncertainty-An Appraisal, 40 Cornell L. Q. 195, 196-222; Amsterdam, NOTE, 109 U. Pa. L. Rev. 67. The U.S. Supreme Court has proposed such a distinction in *Winters v. New York,* 333 U.S. 507, 515-516, where it stated: "The vagueness may be from uncertainty in regard to persons within the scope of the act, . . . or in regard to the applicable test to ascertain guilt."

The trial court has construed and applied Section 647, subsection (a) to proscribe an expression protected by the First Amendment. This application circumvents the constitutional safe guards and standards set forth by the United States Supreme Court in the *Roth* case, *et al.*, and adopted by the California Supreme Court in *Zeitlin*. A statute with language so broad as to permit such a construction and application is, on its face, void for vagueness under the Due Process and Equal Protection clauses of the Fourteenth Amendment.

Winters v. New York, supra, 333 U.S. 507;
Stromberg v. California, supra, 283 U.S. 359.

It is submitted therefore, that under both applications of the void-for-vagueness doctrine as hereinabove set forth, Section 647, subsection (a) is unconstitutionally vague and indefinite.

III.

Only Obscenity Is Proscribed Under the First Amendment Therefore the Trial Court Denied Petitioner Due Process and Equal Protection of the Law in Failing to Instruct the Jury on the Test for Obscenity.

The First Amendment to the United States Constitution guarantees freedom of expression which includes entertainment and amusement. *Winters v. New York, supra,* 333 U.S. 507; *Weaver v. Jordan,* 64 Cal. 2d 235, 242, 40 Cal. Rptr. 537. In order to lose this constitutional guarantee, a questioned expression must be *obscene.*

Roth v. United States, 354 U.S. 476;
Zeitlin v. Arnebergh, supra, 59 Cal. 2d 901;
Alberts v. California, 355 U.S. 852, 78 S. Ct. 8.

Obscenity has been interpreted to include only "hard-core" pornography and determined by the test set forth in *Roth.*

Times Film Corporation v. Chicago, 355 U.S. 35;

One, Inc. v. Olesen, 355 U.S. 371;

Zeitlin v. Arnebergh, supra, 59 Cal. 2d 901;

Memoirs v. Massachusetts, 383 U.S. 413, 418.

Additionally, Section 311 Penal Code provides a test for obscenity.

The Fourteenth Amendment to the United States Constitution and Article I, Sections 11 and 13 of the California Constitution guarantee an individual equal protection and due process under the law.

Assuming, *arguendo,* that Section 647, subsection (a) may be construed to include prohibitions of expressions protected by the First Amendment, nevertheless, petitioners have been denied due process and equal protection under the law in the following respects:

> Petitioners' dances in question are protected expressions under the First Amendment. The trial court failed to instruct the jury that such expressions may be proscribed only if they are obscene. Further, the trial court failed and refused to instruct the jury as to the test for obscenity as set forth either in Section 311 Penal Code or in *Roth v. United States,* 354 U.S. 476.

Therefore, the trial court has failed to accord petitioner due process and equal protection as provided by law.

Conclusion.

The question is whether the protection of the First Amendment, with its concomitant test for obscenity, is applicable to entertainment when alleged to be lewd or dissolute. It becomes especially crucial when one is threatened with lifetime registration as a sex offender.

This Court has not heretofore passed on this issue. It is therefore urged that this Court grant certiorari herein.

Respectfully submitted,

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